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No. 77-220

In the Supreme Court of the United States

OCTOBER TERM, 1977

FAIRFAX AUTO PARTS, INC. AND FAIRFAX AUTO PARTS OF NORTHERN VIRGINIA, INC., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
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Washington, D.C. 20530.

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Petitioners seek review of the decision below holding that they constitute a "controlled group of corporations" within the meaning of Section 1563(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) and are therefore entitled to only one surtax exemption.

Section 1561 of the Code denies to members of a controlled group of corporations more than one surtax exemption. Section 1563(a)(2) defines "controlled group of corporations" to include two or more corporations if five or fewer individuals own stock possessing: (A) at least 80 percent of the combined voting power or of the total value of the stock of each corporation, and (B) more than 50 percent of the combined voting power or total value of the stock of each corporation, taking into account for

this latter purpose stock ownership of an individual only to the extent of that individual's identical ownership with respect to each corporation. Here, William Herbert owned 100 percent of the stock of Fairfax Auto Parts, Inc. (Fairfax) and 55 percent of the stock of Fairfax Auto Parts of Northern Virginia (Northern), while another individual, Joseph Ofano, owned the other 45 percent of Northern (Pet. App. 3a).

It is undisputed that Herbert's 55 percent ownership of Northern and his 100 percent ownership of Fairfax meet the 50 percent common ownership test of Section 1563 (a)(2)(B). Petitioners also meet the 80 percent test because more than 80 percent (*i.e.*, 100 percent) of the stock of Fairfax was owned by one individual and more than 80 precent (*i.e.*, 100 percent) of the stock of Northern was owned by two individuals.

In a reviewed decision over the dissent of four judges, however, the Tax Court held that Northern did not meet the 80 percent test of Section 1563 (a)(a)(2)(A) because Ofano's stock in Northern could be taken into account only if he owned at least some stock in the other member of the corporate group. Since Ofano owned no stock in Fairfax, the Tax Court held that petitioners did not constitute a controlled group and were eligible for multiple surtax exemptions (Pet. App. 10a). The court of appeals reversed *per curiam* (Pet. App. 17a-19a).

The court of appeals correctly held that petitioners were not members of a controlled group within the meaning of Section 1563(a)(2)(A). Nothing in the statute suggests that each of the "five or fewer persons" must own stock in each of the corporations before their holdings are considered for purposes of the 80 percent test. Whatever common

ownership Congress required is embodied in the 50 percent test of Section 1563(a)(2)(B). which petitioners concededly meet.

The incorporation of a further common ownership requirement under the 80 percent test would serve no reasonable purpose. As the Tax Court minority pointed out (Pet. App. 15a), such a common ownership rule could be satisfied by ownership of only a single share in one or more of the corporations. Treasury Regulations, Section 1.1563-1(a)(3) (26 C.F.R.), provides that common ownership is not required for purposes of the 80 percent test. Since this Regulation is reasonable and consistent with the statute, the court of appeals properly upheld it. *United States* v. *Correll*, 389 U.S. 299, 306-307; *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501.

Petitioners argue (Pet. 4-7) that the decision below creates a "potential conflict" with the other courts of appeals. While petitioners (Pet. 5) correctly point out that the Tax Court has adhered to its position, a second court of appeals has reversed it in accord with the decision below. *T. L. Hunt, Inc.* v. *Commissioner*, C.A. 8, Nos. 76-1894 to 76-1898, decided September 14, 1977. Thus, the only appellate decisions to date uniformly uphold the Commissioner's Regulations. Since the conflicts between circuits that this Court resolves are actual ones, not potential, there is no occasion for further review. Moreover, petitioners have made no valid showing of administrative importance. Indeed, petitioners acknowledge (Pet. 9) that "there are no known statistics to show the value of the revenue effect attributable to corporations in controlled groups * * * having the characteristics of the petitioners * * *." The $718 million figure petitioners suggest (*ibid.*) is therefore entirely unrelated to the fiscal impact of the question presented in this case.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

SEPTEMBER 1977.